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The War Powers Resolution Of. 1973: An Attempt To Regulate War Powers Proves Inadequate

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Abstract

The executive and legislative branches of government have struggled over control of the war powers since the adoption of the Constitution in 1789.

KEYWORDS: powers, war, inadequate

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I. Introduction

The executive and legislative branches of government have struggled over control of the war powers since the adoption of the Constitution in 1789.¹ However, the nation lacked any statutory procedure to handle its "highly complex, confused use-of-force problems" until 1973.² The War Powers Resolution of 1973,³ enacted by the Ninety-Third Congress, was to provide a framework for the application of shared powers.

The Ninety-Eighth Congress, in 1983, deviated from both the letter and spirit of the War Powers Resolution by not requiring Presidential compliance with its provisions, and then by passing the Multinational Force in Lebanon Resolution.⁴ The alleged "compromise"⁵ between the executive and legislative branches, represented by the Multinational Force in Lebanon Resolution, demonstrated that the War Powers Resolution had failed to change the way the United States engaged its military forces. The result of political maneuvering, the Multinational Force in Lebanon Resolution permitted the government to escape all the safeguards built into the War Powers Resolution.

This note examines the War Powers Resolution, its text and background, and analyzes its application to the military situation in Leba-

1. See generally Reveley, *The Power to Make War*, in *THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY* 83 (1976); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 80-125 (1972); O. H. STEPHENS & G.J. RATHJEN, *FOREIGN AFFAIRS*, in *THE SUPREME COURT AND THE ALLOCATION OF CONSTITUTIONAL POWER* 308-319 (1980); M. PUSEY, *THE WAY WE GO TO WAR* (1969); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

2. Reveley, *supra* note 1, at 86.

3. War Powers Resolution of 1973, 50 U.S.C. § 1541-1548 (1973) [hereinafter cited as War Powers Resolution].

4. The Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983).

5. Arguably, it was not a compromise at all. See *Statutory Authorization Under the War Powers Resolution—Lebanon: Hearing and Markup on H.J. Res. 364 and H. Res. 315 Before the Committee on Foreign Affairs of the House of Representatives*, 98th Cong., 1st Sess. 77 (1983) (statement of Congressman George Crockett).

non during 1982 and 1983. Since that application was the first comprehensive test of the War Powers Resolution, it offers a unique opportunity to evaluate the Resolution's efficacy and conclude that, in fact, neither the concept of shared powers or the procedural requirements of the Resolution have been implemented.

II. The Text of the War Powers Resolution

The War Powers Resolution of 1973 culminated several years of national debate over the Vietnam war and the relative warmaking powers of Congress and the President. Underlying the Resolution was an intent to harness executive powers and to ensure that future military engagements would be endorsed through the democratic process and gain public acceptance and support.⁶In adopting the War Powers Resolution, Congress set forth its intent to avail itself of its constitutional role in war-making decisions. The "Purpose and Policy" section of the Resolution states:

It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.⁷

This language explicitly calls for a sharing of the power, between Congress and the President, to make war. The act embraces a wide scope of military operations and is not limited to situations of formally declared war.

The war powers of the federal government are within the "zone of

6. If a majority does not acquiesce, at least, in national policy, the country plunges into controversy, with a devastating impact on national effectiveness at home and abroad. In this century Versailles and Vietnam are witness to the dismal consequences of a failure to create and maintain consensus behind U.S. initiatives abroad. The antidote for this affliction was termed bipartisanship during the days when foreign affairs significantly divided Republicans from Democrats. An end to the acrimony between the executive and Congress is the more pressing concern today, followed by an articulation by both of a foreign policy acceptable to the country at the large.

Reveley, *supra* note 1, at 92.

7. War Powers Resolution, at § 1541(a).

twilight” as described by Justice Jackson in *Youngstown Sheet and Tube Company v. Sawyer*.⁸ In the famous “*Steel Seizure Case*,” Justice Jackson expounded the proposition that some constitutional powers of the executive and legislative branches are meant to overlap, and that the extent of independent authority that one branch may properly exercise within this “zone of twilight” is dependent upon the degree to which corresponding authority is exercised by the other branch.⁹ Justice Jackson concluded that when a President acts inconsistently with the expressed will of Congress in an area of shared power, “[c]ourts can sustain exclusive Presidential control in such a case only by disabling Congress from acting on the subject.”¹⁰

Congress expressed its claim of right to share war powers in section 2(b) of the War Powers Resolution.¹¹ That section bases the legitimacy of the Act on Congress’ constitutional “necessary and proper” powers.¹² Although not mentioned in the Resolution, the Constitution also grants Congress the power to “declare war,”¹³ to “raise and support armies,”¹⁴ to “provide and maintain a navy,”¹⁵ to regulate the “land and naval forces,”¹⁶ and to have authority over the militia.¹⁷ The subject of war powers, therefore, is not one from which the courts could “disable” Congress.¹⁸ The foundation established, the Resolution goes on to construct a procedural mechanism for the exercise of shared powers. It mandates that the President “shall” consult with Congress prior

8. 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

9. *Id.* at 635.

10. *Id.* at 637.

11. War Powers Resolution, at § 1541(b) states:

Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers, but also all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof.

Id.

12. U.S. CONST. art. I, § 8, cl. 18.

13. U.S. CONST. art. I, § 8, cl. 11.

14. U.S. CONST. art. I, § 8, cl. 12.

15. U.S. CONST. art. I, § 8, cl. 13.

16. U.S. CONST. art. I, § 8, cl. 14.

17. U.S. CONST. art. I, § 8, cl. 15, 16.

18. The Constitution also vests the president with war powers, its “pertinent language is rife with vague terms, frequent grants of competing authority, and outright omissions.” Reveley, *supra* note 1, at 90.

to military actions, whenever possible.¹⁹ Further, it requires regular consultation with Congress for the duration of any American military engagement.²⁰

The War Powers Resolution specifies a formal procedure for regular reports from the president to Congress. Absent a declaration of war, these reports must begin within forty-eight hours of the introduction of American forces into any one of three possible situations: into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances; into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments that relate solely to supply, replacement, repair, or training of such forces; or when sending military forces in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.²¹ The presidential reports must set forth certain specific information designed to increase accountability, including:

19. War Powers Resolution, at § 1542 states:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Id.

20. *Id.*

21. War Powers Resolution, at § 1543(a) states:

In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; The President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth —

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

Id.

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the circumstances necessitating the introduction of United States Armed Forces; the constitutional and legislative authority under which such introduction took place; and the estimated scope and duration of the hostilities or involvement.²²

The War Powers Resolution, however, does not require a presidential report submitted pursuant to the Act to specify which of the three situations is involved. Consequently, each President who has reported under the Act²³ has avoided citing a particular section, thereby sidestepping the force and effect of the most important safeguard in the Act, section 5(b).²⁴ This section sets a time limit on any presidential deployment of armed forces unless Congress acts to declare war, specifically authorizes a longer period for deployment, or finds itself unable to meet due to war conditions. However, this safeguard applies only when a President reports, pursuant to the War Powers Resolution, on one of the three types of situations discussed above. Therefore, if the

22. *Id.*

23. On April 4, 1975, President Ford reported on United States participation in efforts to transport refugees from Danang and other seaports to safer areas in Vietnam. On April 12, 1975 President Ford reported on United States military actions to evacuate Americans from Cambodia. On April 30, 1975, President Ford reported on United States military forces' actions to evacuate Americans from Vietnam. On May 15, 1975, President Ford reported on United States military action to recover the ship and crew of the Mayaguez from Cambodian forces. On April 26, 1980, President Carter reported on an attempt by the United States military to rescue American hostages being held in Iran. On March 19, 1982, President Reagan reported on the involvement of United States Forces in the Multinational Force and Observers (MFO) in the Sinai. On August 12, 1982, President Reagan made his first report on the dispatch of United States forces to Lebanon. Only President Ford's first report, on April 4, 1975 cited a section of the War Powers Resolution.

24. War Powers Resolution, at § 1544(b) states:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

Id.

President either fails to specify a situation type and its corresponding section or to make a report at all, and if Congress fails to require both a report and a section cite, the section 5(b)²⁵ time limit will not apply.

The War Powers Resolution contains a concurrent resolution provision.²⁶ Congress intended this provision to enable it to direct the removal of American forces from engagement at any time, regardless of section 5(b) time frames. The concurrent resolution purports to carry the force of law without presidential participation. In effect, the concurrent resolution provision of the War Powers Resolution gave Congress a veto power over presidential decisions to commit American armed forces.

In the recent case of *Immigration and Naturalization Service v. Chadha*,²⁷ the United States Supreme Court held that the legislative veto violates the constitutionally prescribed method for lawmaking; the process must include presentment of a bill to the President.²⁸ Although the *Chadha* case involved a veto provision whereby *one* house of Congress claimed a veto power over an executive decision, the subsequent Supreme Court affirmance of a lower court ruling against a two-house veto provision in *United States Senate v. Federal Trade Commission*²⁹ expanded the scope of *Chadha* to concurrent resolutions. Thus, it has been suggested that Congress consider the War Powers Resolution's concurrent resolution provision unconstitutional.³⁰ Removal of that provision, section 5(c), would not cloud the entire Resolution; the Act contains a severability clause that purports to protect remaining provisions from any decision rendering a particular section invalid. A similar severability clause involved in the *Chadha* case was upheld and given effect by the Supreme Court.³¹

25. *Id.*

26. War Powers Resolution, at § 1544(c) states:

Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Id.

27. — U.S. — 103 S. Ct. 2764 (1983).

28. U. S. CONST. art. I, § 7, cl. 2, 3.

29. — U.S. —, 103 S. Ct. 3556 (1983).

30. R. CELADA, EFFECT OF THE LEGISLATIVE VETO PROVISION ON THE TWO-HOUSE DISAPPROVAL MECHANISM TO TERMINATE U.S. INVOLVEMENT IN HOSTILITIES PURSUANT TO UNILATERAL PRESIDENTIAL ACTION (August 24, 1983).

31. — U.S. —, 103 S. Ct. at 2775.

Although the elimination of the concurrent resolution provision weakens the potential for congressional action, it does not dispossess Congress of the power to directly effectuate changes in military policy. Congress is now relegated to expressing its will through a joint resolution which, unlike a concurrent resolution, must be presented to the president. Should a president veto such a joint resolution, the veto would be subject to a potential congressional override. Thus, it appears that Congress could still have the last word in a dispute with the President over policy.

III. The Historical Context of the War Powers Resolution

The War Powers Resolution is a historic piece of legislation. As the Vietnam war was entering its final stages, Congress enacted the Resolution to attempt to ensure against future catastrophic military ventures. Congressional concern arose, in part, from an awareness that the Vietnam experience was fueled by federal statutes providing Presidents with both funds and broad discretion to carry out the war.³² By far the most important such statute was the 1964 Gulf of Tonkin Resolution³³ which gave the President sweeping authority to conduct military operations in Southeast Asia. The Tonkin Resolution provided blanket Congressional consent for whatever actions the President might take. As a practical matter, it afforded the cloak of a federal law for a major escalation that Congress did not foresee. The Gulf of Tonkin Resolution was repealed in 1970 when its usefulness, as an independent source of authority for the President, had evaporated.³⁴

Long before its repeal, the Tonkin Resolution had lost most of its support in Congress as an appropriate federal policy. Growing numbers of congressmen were demanding a greater role in foreign and military affairs.³⁵ The Senate passed the National Commitments Resolution³⁶ in

32. Congress supplied billions of dollars for the war effort through appropriations bills. In addition, Congress passed legislation that provided for selective service and sharply increased manpower limits for the armed forces. For example, the 1967 appropriations act proclaimed Congress' "firm intention to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam. . . ." Pub. L. No. 90-5, 81 Stat. 5 (1967).

33. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).

34. The Foreign Military Sales Act of 1970, Pub. L. No. 91-672, 84 Stat. 2053 (1970) repealed the Tonkin Resolution.

35. "Vietnam undermined the simple confidence in each of the arguments that had traditionally supported congressional deference to the President in the area of for-

1969. This measure defined the nature of an American military commitment as one which had to receive the approval and endorsement of both the President and Congress. First introduced in 1967 by Senator William Fulbright,³⁷ the Resolution expressed the "sense of the Senate" but had no binding effect on either the president or Congress.

The Senate intended the National Commitments Resolution to be an expression of its desire to share war powers with the President. Had that desire been satisfied, it is unlikely that any further legislation on the subject would have been enacted. The desire proved to be a naive one, however, as the executive branch made no change in its policies as a result of the non-binding Resolution. In a 1972 Foreign Relations Committee report,³⁸ the Resolution's failure was noted: "Following the adoption of the National Commitments Resolution it was hoped that the newly installed Nixon administration would take a different view from that of its predecessor. That hope has not been realized."³⁹ It became obvious to the Committee that congressional expressions without the force of law would not bring about a sharing of power.⁴⁰

Congress began to search in earnest for a more effective tool. The appropriations power,⁴¹ through which Congress could either fund military operations or terminate them, was one alternative. However, interest began to focus on legislation which would deal with war powers generically, rather than ways to control particular events and policies. In the summer of 1970, Senator Jacob Javits⁴² was one of the many outspoken advocates who introduced generic war powers proposals in Congress.⁴³

During the early seventies, war raged on in Southeast Asia as American invasions and bombings of Cambodia and Laos were revealed. These revelations spurred a fear that the war was widening. At home, a critical series of domestic issues relating to the Watergate scandal—which eventually forced President Richard Nixon from of-

eign affairs; unity, secrecy, superior expertise, superior sources of information, decision, and dispatch." Allison, 3 LAW & CONTEMP. PROBS. 96 (1976).

36. S. Res. 85, 91st Cong., 1st Sess., in 115 CONG. REC. 17,245.

37. Dem., Arkansas.

38. S. Res. 92-606, 2d Sess. (1972).

39. *Id.*

40. See STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 98th CONG. 2d Sess., THE WAR POWERS RESOLUTION (Comm. Print 1982).

41. U.S. CONST. art. I, § 9, cl. 7.

42. Rep., New York.

43. STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, *supra* note 40, at 48.

fice—was becoming explosive in its own way. In this historical context, the House of Representatives and the Senate each produced a war powers bill. The Senate, led by Senators Javits, Fulbright, and others passed a version which adopted an “authority” test⁴⁴ under which the President’s ability to commit forces without congressional authorization was restricted to emergency situations. The key restraint in the Senate bill was a thirty-day time limit which would begin to run upon deployment of the forces. Unless Congress authorized a longer deployment within those thirty days, the forces would automatically be withdrawn. The House favored a “performance” test⁴⁵ under which the President would be required to report to Congress within seventy-two hours of deployment. The filing of the report, not the deployment, would trigger a 120-day period for independent presidential action. The House deleted any form of prior restraint upon the President; the Senate version defined specific emergency situations and purported to limit independent presidential power to them. A congressional conference committee produced a compromise⁴⁶—the War Powers Resolution of 1973⁴⁷—that consisted of the performance test and a maximum time period of ninety

44. Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?* 16 WM. & MARY L. REV. 823, 832-33 (1974):

The most fundamental difference to be resolved concerned the triggering of the 30- or 120-day period allowed for the President to obtain congressional approval for his deployment of the armed forces. From the first war powers legislation introduced by Senator Javitz, the Senate consistently has specified the emergency situations which would permit Presidential commitment of armed forces without particular congressional authority. Congressman Zablocki’s brief flirtation with this so-called “authority” approach had received short shrift from his committee colleagues in the House who favored a “performance” test. Under the House test the 120-day period would begin to run when the President reported to Congress within 72 hours after having deployed the armed forces, whereas under the Senate’s “authority” test the 30-day period would begin to run upon deployment of the troops. The House conferees argued that an attempt to delineate the President’s warmaking powers specifically was “constitutionally questionable and from a practical standpoint unwise” and that language in the Senate bill giving the President the right to forestall an attack could license preemptive war.

Id. (footnotes omitted)

45. *Id.*

46. See generally *Joint Explanatory Statement of the Committee of Conference*, H.R. REP. NO. 547, 93d Cong. 1st Sess. (1973), reprinted in 119 CONG. REC. 33,037 (1973).

47. War Powers Resolution, *supra* note 2.

days for presidential action without Congressional concurrence.⁴⁸ The basis of the Senate's provision delineating presidential warmaking authority survived, but only as an element of the bill's non-binding Purpose and Policy section:

The Constitutional powers of the President as Commander-in-Chief to introduce the United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.⁴⁹

The Senate overwhelmingly approved the compromise, 75-20, on October 10, 1973,⁵⁰ and two days later, the House followed suit by a vote of 238-123.⁵¹ Senator Fulbright, expressing his satisfaction with the product sent to President Nixon, said that the bill was a "historic recapture" of Congressional powers and predicted that "[n]ever again will the war making practices of this country be the same."⁵²

By the time the War Powers Resolution reached President Nixon's desk, the President's public support and credibility had nose-dived. Only his constitutional veto power stood in the way of the bill's climb to the status of law. Citing constitutional, institutional, and policy objections to the legislation, the President vetoed it.⁵³ Efforts to override the veto began immediately thereafter. The outcome was in doubt because the War Powers Resolution had not attained a two-thirds majority when it was initially approved and sent to the President; additional votes were needed for a successful override attempt. On seven previous occasions, the President had been able to stave off an override of his veto.⁵⁴ On this occasion, it was different. Congress was influenced by public distress over the Vietnam war and the unfolding Watergate

48. If congressional authorization for further deployment was not forthcoming within 60 days, the deployment had to be terminated; the president could extend the period by another 30 days if he certified that the additional time was necessary for the safety of American forces.

49. War Powers Resolution, at § 1541(c).

50. 119 CONG. REC. S19,006 (daily ed. Oct. 10, 1973).

51. 119 CONG. REC. H8963 (daily ed. Oct. 12, 1973).

52. New York Times, Oct. 5, 1973, at 11.

53. Veto of War Powers Resolution, 1973 PUB. PAPERS of Richard Nixon 893 (1975).

54. STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, *supra* note 40, at 159,160.

scandal. The President was not able to garner the necessary support from the House of Representatives, which had protected five of President Nixon's eight previous vetoes; the House voted to override, by four votes.⁵⁵ The Senate also voted to override, 75-18.⁵⁶ The War Powers Resolution became law in the face of presidential opposition.⁵⁷ "It was an overwhelming demonstration of the interests of the people who had been aroused."⁵⁸

IV. The Passage of the Multinational Force in Lebanon Resolution

For ten years after passage of the War Powers Resolution there were no major confrontations over war powers.⁵⁹ Congress resorted to statutes which expressed its will on particular issues without invocation of War Powers Resolution procedures.⁶⁰ However, ten years of dormancy had not buried the Resolution. In 1983, President Ronald Reagan and the Ninety-Eighth Congress gave the Resolution its first comprehensive test.

A. Background

Lebanon, for thousands of years the site of violence, terrorism, and war, served as an arena for conflicting international interests in 1982. By the summer of 1982, Israeli armed forces had pushed the Palestine Liberation Organization's combatants from the Israeli-Lebanese border to the Lebanese capital of Beirut.⁶¹ Hesitant to carry the battle into the

55. 119 CONG. REC. H36221 (Nov. 7, 1973).

56. 119 CONG. REC. S36198 (Nov. 7, 1973).

57. For the President's reaction to the override vote, see White House Statement Following Action by the Congress Overriding the President's Veto (Nov. 7, 1973), in 9 WEEKLY COMP. PRES. DOC. 1312 (Nov. 5, 1973). For an analysis of the override vote, see 29 CONG. QUART., 93d Cong., 1st Sess. 905 (1973).

58. 129 CONG. REC. S12,986 (daily ed. Sept. 27, 1983) (Statement of Senator John Stennis).

59. See generally T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS 71-76 (1979).

60. See, e.g., Boland Amendment to the 1983 Department of Defense Appropriations Act, Pub. L. No. 97-337, § 793 (1982), which prohibited certain military activities in Central America.

61. Democratic Study Group, Lebanon and The War Powers Act, Special Report No. 98-11 at 9 (Sept. 19, 1983).

city, the Israelis entered into international negotiations.⁶²

On July 6, 1982, President Reagan announced that he had approved a plan for United States participation in a multinational force which would supervise the evacuation of the Palestine Liberation Organization fighters from Beirut.⁶³ According to press reports, the President approved the plan on July 2.⁶⁴ However, he did not consult with Congressional leaders until the day of his announcement.⁶⁵ That same day, House Foreign Affairs Committee Chairman Clement Zablocki⁶⁶ sent a letter to the President warning of "incalculable effects on executive-legislative relations" if Reagan failed to trigger the War Powers Resolution.⁶⁷ While the President acquiesced in reporting to Congress concerning the deployment, he rebuffed Representative Zablocki's admonition by failing to specify which of the several sections of the Resolution applied. In so doing, he prevented the time limitations, after which he could not act on his own authority, from beginning to run.

The Marines completed their evacuation mission on September 10, 1982, and withdrew from Lebanese territory.⁶⁸ However, during the next week three events occurred which precipitated a Presidential order for the Marines to return: the assassination of Lebanese President Bashir Gemayal, a massacre of civilians by the Christian Phalangist Militia, and the entry of Israeli forces into West Beirut.⁶⁹ On September 29, the Marines and their fellow "peace-keepers" landed in Lebanon once again. President Reagan issued a second report to Congress, again failing to cite a section of the War Powers Resolution.⁷⁰

Section 4(a)(1) of the War Powers Resolution, which triggers the time limits for presidential action, applies to situations of "hostilities" or "imminent involvement in hostilities."⁷¹ Had President Reagan classified the situation in Beirut in terms of this section, the sixty-day period would have begun. The President's refusal to acknowledge the ap-

62. *Id.*

63. War Powers Resolution: Presidential Compliance, CSR Issue Brief No. IB81050 at 3 (updated Sept. 15, 1983).

64. *Id.* at 4.

65. *Id.*

66. Democrat, Wisconsin.

67. War Powers Resolution: Presidential Compliance, *supra* note 63, at 4.

68. *Id.*

69. *Id.*

70. *Id.*

71. War Powers Resolution, at § 1543(a).

plicability of section 4(a)(1)⁷² continued even after Marines were killed or wounded on September 30, 1982, March 15, 1983, and September 6, 1983. While the President steadfastly rejected a label of "hostilities" for the Marine's predicament, he nevertheless continued to increase the might of American forces at the scene. By September 1983, the combined naval and land battle group totalled over twelve thousand personnel and a large number of surface ships.⁷³ On September 6, 1983, elements of the naval group fired on gun positions in the mountains overlooking the Marine contingent. This episode marked the first use of American naval artillery since the Vietnam war.⁷⁴

In Washington, concern over the course of events was brewing in Congress. In early September, several leaders called on the President to give Congress a greater role in the situation and to invoke section 4(a)(1) of the War Powers Resolution.⁷⁵ However, the administration responded that any Congressional action would hinder the executive branch's strategy in the region, and took the position that the War Powers Resolution was an unconstitutional interference with presidential authority.⁷⁶ Despite the President's summary rejection of Congress' contentions, representatives of the two branches met to work towards agreement on policy. These negotiations collapsed on September 15, 1983,⁷⁷ the President's representatives having refused to accept any Congressionally-imposed time limit whatsoever. The administration argued that the Lebanon situation did not qualify as "hostilities" within the meaning of the War Powers Resolution. Secretary of State George Shultz maintained that the Marines were not engaged in hostilities, but rather were "in a situation where there is violence."⁷⁸ Such statements drew heated retorts from members of Congress.⁷⁹ A consensus within

72. *Id.*

73. Democratic Study Group, The Lebanon Resolution, Fact Sheet No. 98-17 at 1 (Sept. 27, 1983).

74. *Id.*

75. Congress Wants Greater Role On U.S. Presence in Lebanon, CONG. QUART. 1876 (Sept. 3, 1983).

76. Democratic Study Group, *supra* note 73, at 1.

77. *Id.*

78. Congress Wants Greater Role On U.S. Presence in Lebanon, *supra* note 75.

79. "We have people up in helicopters, we're shooting rockets and artillery—if that isn't imminent hostilities, I don't know what is," remarked Senate Foreign Relations Committee Chairman Charles Percy (Republican, Illinois) *Id.* "It makes a mockery out of law to suggest that our forces are not engaged in hostilities," concluded Senator Gary Hart (Democrat, Colorado). Letter from Senator Hart to author (October 6, 1983).

Congress, that "hostilities" existed as of the first Marine death, began to take shape.⁸⁰

Despite its desire to produce bipartisan support for the deployment, the administration rejected a proposal from the Democrat-controlled House Foreign Affairs Committee that called for invocation of War Powers Resolution procedures and authorized a stay of up to eighteen months for the Marines in Lebanon. Senate Democrats responded to this rejection by formally introducing a bill to declare that section 4(a)(1) of the War Powers Resolution and its accompanying time restraints applied to the situation in Lebanon. The White House immediately softened its position, re-opened negotiations with House leaders, and reluctantly struck a "compromise" that was "virtually identical to the resolution that was rejected by the administration a week earlier."⁸¹ The President accepted the House Foreign Affairs Committee proposal as a bipartisan compromise. Despite his acceptance of the eighteen month authorization, concept however, President Reagan did not retract his opinion that the War Powers Resolution was unconstitutional. In fact, he adhered to the position that neither the Lebanon Resolution nor the War Powers Resolution could have any impact on his constitutional powers as Commander-in-Chief.

B. Legislative Process

Titled the Multinational Force in Lebanon Resolution, the compromise measure was introduced as a joint resolution into both houses of Congress. From the outset, Congressional debate over the Multinational Force in Lebanon Resolution was a compilation of expressions on the Constitution, the War Powers Resolution, and current Presidential policies in Lebanon. Within both houses of Congress there was an apprehension that the proposed resolution was, as characterized on the floor of the Senate, a "political compromise to [sic] the Lebanon situation [which] instead compromises the very nature of the War Powers Resolution."⁸² There was a growing fear that the War Powers Resolution would be invoked in name only, without any actual limitations on executive action: "[i]t is a compromise put together to help the admin-

80. Reid, *Marines Could Spark Legal Crisis*, Washington Post Sept. 20, 1983, at A8.

81. Democratic Study Group, *supra* note 73.

82. 129 CONG. REC. S13,131 (daily ed. Sept. 29, 1983) (statement of Senator Jim Sasser).

istration avoid invoking the War Powers Resolution.”⁸³

The Multinational Force in Lebanon Resolution was taken up by the full Senate on September 27, 1983. One of the architects of the War Powers Resolution, former Senator Jacob Javits, submitted a statement that expressed his view that the Multinational Force in Lebanon Resolution was a device beneficial to both the President and Congress.⁸⁴ Opponents of the bill were equally vocal, however.⁸⁵ One Senator, seeing no benefit to Congress, described the measure as an invitation for the President to “take 1,600 Marines and the Battleship New Jersey, and call us in 1985.”⁸⁶ A number of attempts to amend the authorization bill were made and rejected. Senator Robert Byrd⁸⁷ introduced an amendment⁸⁸ which would have invoked the War Powers Resolution’s time restraints. The Byrd amendment was tabled, 55-45.⁸⁹ Senator Clairborne Pell⁹⁰ presented an amendment which provided for six months of authorization rather than eighteen.⁹¹ Senator Pell’s amendment was tabled, 62-38.⁹² Senator Christopher Dodd⁹³ and Senator Edward Kennedy⁹⁴ proposed an additional condition to the continuation of American participation in the multinational force; their amendment required an American withdrawal if all other contributing nations withdrew. This amendment was accepted and incorporated into the Multinational Force in Lebanon Resolution.⁹⁵ Senator Paul Tsongas sought to “codify the statements that ha[d] been made,”⁹⁶ referring

83. 129 CONG. REC. S13,132 (daily ed. Sept. 29, 1983) (statement of Senator Jim Sasser).

84. 129 CONG. REC. S12,991 (daily ed. Sept. 27, 1983).

85. 129 CONG. REC. S13,126-13,132 (daily ed. Sept. 29, 1983).

86. 129 CONG. REC. S13,044 (daily ed. Sept. 28, 1983) (statement of Senator Edward Kennedy).

87. Democrat, West Virginia.

88. Amendment No. 2231, at 129 CONG. REC. S13,041 (daily ed. Sept. 28, 1983).

89. 129 CONG. REC. S13,138 (daily ed. Sept. 29, 1983).

90. Democrat, Rhode Island.

91. Amendment No. 2228, at 129 CONG. REC. S13,139 (daily ed. Sept. 29, 1983).

92. 129 CONG. REC. S13,143 (daily ed. Sept. 29, 1983).

93. Democrat, Connecticut.

94. Democrat, Massachusetts.

95. 129 Cong. Rec. S13,145-46 (daily ed. Sept. 29, 1983). The Dodd-Kennedy amendment was also incorporated into the House version of the Multinational Force in Lebanon Resolution.

96. 129 CONG. REC. S13,147 (daily ed. Sept. 29, 1983).

to the administration's assertions that Marine operations were confined to the geographic boundaries of Beirut. Tsongas' amendment was tabled, 56-42.⁹⁷ Senator Thomas Eagleton,⁹⁸ himself an important contributor to war powers legislation,⁹⁹ urged his colleagues to "tighten-up" the Resolution by replacing the word "protective" with the word "defensive" within the context of limits on military activities. "'Protective' is a more ambiguous word and susceptible to somewhat broader interpretation than 'defensive'."¹⁰⁰ Senator Eagleton's amendment, which would have changed those words, was tabled 66-34.¹⁰¹

Another amendment, introduced by Senators Carl Levin and Jennings Randolph, attempted to ensure that later judicial review of executive acts under the War Powers Resolution could not be avoided by the "political question" doctrine.¹⁰² The fact that a case challenging American military activities in El Salvador, *Crockett v. Reagan*,¹⁰³ was dismissed as a non-justiciable case involving a "political question" concerned many Senators. In *Crockett*, the United States District Court for the District of Columbia held that the issue of whether American troops were engaged in hostilities in El Salvador required resolution by the political branches, not by the judiciary.¹⁰⁴ According to the district court, which was subsequently upheld on appeal, the case was "non-justiciable because of the nature of the fact finding that would be required."¹⁰⁵ The text of the proposed amendment included stipulated facts on which a future judicial decision could be based, including a factual finding that hostilities existed as of the first Marine death. Such a finding would be binding on a President that signed on to it. However, the Senate defeated the effort to "eliminate any escape clause,"

97. *Id.*

98. Democrat, Missouri.

99. Senator Eagleton contributed to the Senate version of the War Powers Resolution, but did not support the Resolution as it emerged from Conference Committee in 1973. He believed that the Committee's product amounted to a loss of, rather than a gain in, Congressional authority.

100. 129 CONG. REC. S13,149 (daily ed. Sept. 29, 1983).

101. *Id.*

102. See generally *Baker v. Carr*, 369 U.S. 186 (1962). See also Tigar, *Judicial Power, the 'Political Question Doctrine,' and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

103. 558 F. Supp. 893 (D. D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983). See also *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D. D.C. 1983).

104. 558 F. Supp. at 888, 889.

105. 558 F. Supp. at 896.

54-45.¹⁰⁶ Rather than a finding of fact, the Multinational Force in Lebanon Resolution dealt with the "hostilities" issue as a Congressional declaration, which could not bind the President.

Despite opposition on various grounds, including wide differences of opinion on policy matters and the need for literal adherence to the War Powers Resolution, proponents of the Multinational Force in Lebanon Resolution found the votes necessary to secure its passage. On September 29, 1983, the Senate voted largely along party lines and approved the so-called "bipartisan" measure, 54-46.¹⁰⁷

In the House of Representatives, the debates did demonstrate a higher degree of bipartisanship than existed in the Senate. Still, many of the arguments were the same. It was asserted that the Multinational Force in Lebanon Resolution "maintain[ed] congressional responsibility but allow[ed] the President the latitude he must have."¹⁰⁸ The House debates also revealed the entanglement of issues that existed in the Senate. Expressing a preference for dealing with the policy questions, Representative Raymond McGrath¹⁰⁹ said that "[t]he issue today is not really whether the President should or should not have invoked the War Powers Act in the first place. It is whether a majority of the people in this House believe our commitment to Lebanon, via the peace-keeping force, should continue or not."¹¹⁰

Under a semi-closed rule of procedure,¹¹¹ which restricted floor debate, the House basically had only two alternatives to consider. The first was the Multinational Force in Lebanon Resolution; the second was a substitute offered by Representatives David Obey¹¹² and Gillis Long.¹¹³ The Obey-Long substitute would have cut off funds for United States forces in Lebanon after ninety days unless the President either submitted to section 4(a)(1) of the War Powers Resolution, or certified that a cease-fire existed and reported on a monthly basis pursuant to the War Powers Resolution. This alternative proposal was designed to "provide a meaningful way for Congress to exercise a role in the deci-

106. 129 CONG. REC. S13,149 (daily ed. Sept. 29, 1983).

107. 129 CONG. REC. S13,167 (daily ed. Sept. 29, 1983).

108. 129 CONG. REC. H7568 (daily ed. Sept. 28, 1983) (statement of Congressman Reid).

109. Republican, New York.

110. 129 CONG. REC. H7619 (daily ed. Sept. 28, 1983).

111. H.R. Res. 318 (129 CONG. REC. H7560, daily ed. Sept. 28, 1983) limited debate; Representative Levitas labeled the limitations a "gag rule" (at H7561).

112. Democrat, Wisconsin.

113. Democrat, Louisiana.

sion to leave Marines in Lebanon as events change. . . ."¹¹⁴ The Obey-Long substitute was defeated, however, 272-158.¹¹⁵

With the substitute eliminated, the House turned its attention to a block of amendments offered by Chairman Zablocki.¹¹⁶ These amendments, which were accepted by the House acting as a Committee of the Whole and incorporated into the Multinational Force in Lebanon Resolution,¹¹⁷ changed the requirement for Presidential reports under the Multinational Force in Lebanon Resolution from at least once every six months (which would have been consistent with War Powers Resolution reporting requirements)¹¹⁸ to at least once every sixty days.¹¹⁹ These amendments also noted specific areas to be covered by such reports, and expressed Congressional policy concerns over such matters as a partition of Lebanon.¹²⁰

As Representative William Lehman¹²¹ had noted before the debates had begun, "[w]hen the President and the House leadership get together on something, they usually get what they want."¹²² The only order of business remaining was a vote on the Multinational Force in Lebanon Resolution as amended. As predicted, the joint resolution passed, 270-161.¹²³

The next day, September 29, the resolution passed by the Senate was reported to the House. The significant difference between the Senate and House versions was the difference in reporting requirements; the House bill required a report at least every sixty days,¹²⁴ whereas the Senate bill required a report at least every ninety days.¹²⁵ Chairman Zablocki told the House that the President had voluntarily agreed to a sixty-day requirement,¹²⁶ and that there was "no further need for

114. 129 CONG. REC. H7582 (daily ed. Sept. 28, 1983).

115. 129 CONG. REC. H7617 (daily ed. Sept. 28, 1983).

116. Democrat, Wisconsin.

117. 129 CONG. REC. H7622 (daily ed. Sept. 28, 1983).

118. War Powers Resolution, at § 1543.

119. The Senate's version, as debated and passed, specified a 90 day reporting requirement.

120. These items were eventually deleted from the bill; the House later adopted the Senate version, which did not contain specified areas to be reported or on policy opposition to a partition of Lebanon. See *infra* text accompanying notes 124-29.

121. Democrat, Florida.

122. Interview with Representative William Lehman, in Miami (Sept. 21, 1983).

123. 129 CONG. REC. H7623 (daily ed. Sept. 28, 1983).

124. H.R.J. RES. 159, 93d Cong., 1st Sess. (1983).

125. S.J. RES. 364, 93d Cong., 1st Sess. (1983).

126. 129 CONG. REC. H7725 (daily ed. Sept. 29, 1983).

discussion or delay.”¹²⁷ The House promptly voted to accept the Senate version, 253-156,¹²⁸ to lay aside the previously approved House version, and to send the Multinational Force in Lebanon Resolution to the President.¹²⁹ The net effect of the bill’s language was to provide statutory authorization for continued deployment, pursuant to the War Powers Resolution, without addressing the failure of both Congress and the President to realize the aspirations of the Resolution.

President Reagan signed the statute into law on October 12, 1983, and in an accompanying statement¹³⁰ emphasized the “bipartisan basis” upon which foreign policy should be conducted.¹³¹ As expected, the President expressed “reservations about some of the specific Congressional expressions”¹³² in the Resolution. The President’s statement characterized the automatic termination provision of the War Powers Resolution as an “arbitrary and inflexible”¹³³ deadline that improperly restricts presidential authority. President Reagan argued that “isolated and infrequent”¹³⁴ attacks upon American forces did not constitute hostilities which would invoke the “unwise”¹³⁵ timetable of the War Powers Resolution.

Most significantly, the statement expressed the President’s conviction that despite his signing the Multinational Force in Lebanon Resolution into law, he could not be bound by it:

I believe it is, therefore, important for me to state in signing this Resolution, that I do not and cannot cede any of the authority vested in me under the Constitution as President and Commander-in-Chief of United States Armed Forces. Nor should my signing be viewed as any acknowledgement that the President’s constitutional authority can be impermissibly infringed by statute, that congressional authorizations would be required if and when the period specified in section 5(c) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that section 6 of the Multinational Force in Lebanon Resolution may be

127. *Id.*

128. 129 CONG. REC. H7726 (daily ed. Sept. 29, 1983).

129. *Id.*

130. Statement of the President, 19 WEEKLY COMP. PRES. DOC. No. 41 (Oct. 12, 1983).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

interpreted to revise the President's constitutional authority to deploy United States Armed Forces.¹³⁶

The President signed the Multinational Force in Lebanon Resolution to gain a minimum of eighteen months of congressional blessing for his policies. It was the President's position that the statute in no way put a maximum time limit on deployment because no statute could diminish his independent authority over war powers.

V. Conclusion: The Continuing Need For Accountability

The saga of the Multinational Force in Lebanon Resolution highlights a need for the nation to once again focus on the process by which it becomes engaged militarily. Lives of American soldiers were at stake, yet neither the legislative nor executive branch of the federal government was willing to stand firm and abide by the provisions of the War Powers Resolution. Just ten years after its passage, the purpose of the War Powers Resolution has been substantially undermined. Although just a few months have elapsed since the Multinational Force in Lebanon Resolution became law, it is not premature to conclude that the effect of this measure was essentially to restore the pre-War Powers Resolution status quo in the form of unchecked presidential discretion. Have the wounds from the Vietnam experience healed so completely that the nation has forgotten, and failed to learn from them?¹³⁷ In the days since the Lebanon Resolution's enactment, more than 240 Americans have lost their lives in Lebanon, and hostilities continue.

Since the inception of American troop deployment in Lebanon, President Reagan chose not to comply with the procedural regulations and safeguards built into the War Powers Resolution. Before he acquiesced in the compromise which evolved into the Multinational Force in Lebanon Resolution, the President chose not to challenge the constitutionality of the War Powers Resolution in court as a means of forestalling and/or terminating Congressional demands for a role in military

136. *Id.*

137. See generally Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?* 55 VA. L. REV. 1243 (1969); Wormuth, *The Vietnam War: The President versus the Constitution*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 711 (R. Falk ed. 1969); Buchan, *Questions About Vietnam*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 35 (R. Falk ed. 1969); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972).

policy.¹³⁸ That alternative had little political appeal and presented the potential for an enormous erosion of executive power; a ruling adverse to the President's position would inspire more frequent and more effective congressional action.

The course of action clearly anticipated by the War Powers Resolution would have been for President Reagan to admit the existence of hostilities in Lebanon as of September of 1982, and to seek congressional authorization for continued deployment. Had the President taken this step he would have abided by and upheld the law, and realized the sharing of responsibility that was the intent behind the War Powers Resolution; further, he would have been in a favorable position to build truly bipartisan support for his policies both within Congress and amongst the people. Instead, President Reagan apparently ignored the letter and spirit of the War Powers Resolution for as long as he could. When American casualties in Lebanon forced the issue to the forefront, the President resorted to semantics and arguably attempted to sidestep the law. In the process, he demonstrated that the United States can still become involved in a military conflict without due regard for its own law.

Perhaps Congress is culpable for permitting President Reagan to evade the War Powers Resolution. For more than a year, Congress sat idle as American soldiers dug in between warring factions. Congress failed to require the President to submit to section 4(a)(1) of the War Powers Resolution, and the sharing of responsibility did not take place. Congressional abstinence from its lawful role revealed its ignorance of the fact that "once our troops are committed to a hostile situation, it is almost impossible to pull them out."¹³⁹ In September of 1983, deaths

138. "[The President] and his aides have produced no legal brief or other document justifying their refusal to comply with the [War Powers Resolution]. And the reason is simple: They have none. There is talk in the newspapers, for example, that the Congress is demanding something that is 'unconstitutional'; but we have seen no Opinion of the Attorney General reaching that conclusion." Lewis, —, N.Y. Times, Sept. 19, 1983 at A-19.

139. 129 CONG. REC. H7582 (daily ed. Sept. 28, 1983) (statement of Representative Luken). *Accord* Henkin, *A More Effective System for Foreign Relations: The Constitutional Framework*, 66 VA. L. REV. 751, 766 (1975):

[O]nce we are at war, Congressional control—which in my view Congress continues to have—becomes largely hypothetical. In Indochina, Congress had constitutional authority, by resolution or through the appropriation process, to terminate, confine, or otherwise limit our participation. But a large majority of Congress felt it could not break with the President without jeopardizing the lives of American troops and other national interests.

and injuries to American troops partially awoke Congress from its hibernation. As Senator Lawton Chiles ¹⁴⁰ remarked, “[f]ive of our boys had already died by the time Congress got around to consider invocation of the War Powers Act.”¹⁴¹

Under pressure of public concern for the Marines and the possibility of war, Congress did pass legislation under the War Powers Resolution. That legislation—the Multinational Force in Lebanon Resolution—does little more than “rubber stamp”¹⁴² the President’s policies. The objective of the War Powers Resolution, according to the House Foreign Affairs Committee, was to “allow the President and Congress to work together in mutual respect towards their ultimate, shared goal of maintaining the peace and security of the nation.”¹⁴³ Neither the objective of the War Powers Resolution, nor the “ultimate goals” involved were achieved by the Multinational Force in Lebanon Resolution.

The Lebanon experience sets a dangerous precedent for the future. The President and Congress have failed to demonstrate an understanding that “loophole-making is not in [their] own, nor in the country’s best interest.”¹⁴⁴ With the judiciary an unlikely participant in the resolution of war powers issues,¹⁴⁵ concurrent irresponsibility on the part of the executive and legislative branches upsets the treasured American notion that the United States is a “nation of laws, not men.”¹⁴⁶

The Multinational Force in Lebanon Resolution, and the national policies that it represents, have rekindled public concern over “presidential credibility and integrity, [over] congressional gullibility, and [over] the effectiveness of our foreign policy system.”¹⁴⁷ The experience, and the possible renewal of attention to the process through which war powers are implemented, may bring about refinements in

In a word, the constitutional restraints on the President existed but were not effective.

Id.

140. Democrat, Florida.

141. Letter from U.S. Senator Lawton Chiles to author (Nov. 29, 1983).

142. *Id.*

143. H.R. REP. NO. 93-287, 93d Cong., 1st Sess. 5 (1983).

144. FRANCK & WEISBAND, *supra* note 56, at 75.

145. War powers are “so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

146. *Myers v. U.S.*, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting).

147. *Henkin*, *supra* note 135, at 761.

the process and an increased awareness both within the government and the public. In the future, both the President and Congress must overcome the tendency to confuse a military policy with the lawful procedure to implement that policy. The procedure, the War Powers Resolution, requires democratic control over questions of war and peace. "Democratic control involves decisions made by all the federal representatives of the people—the president, the Senate, and the House—on a timely and informed basis."¹⁴⁸ Both the President and Congress must abide by the War Powers Resolution, or change it through the legislative process. This note makes no suggestion for changes in the statute, because absent a commitment to the principles of shared power and responsibility, a change of language will not compel either the President or Congress to be faithful to the ideal. Only an informed public, a citizenry that keeps watch over the process by which its country enters into international hostilities, can require adherence to the law and to democratic principles on the part of their elected representatives.

Paul D. Novack

148. Reveley, *supra* note 1, at 93.